(8)

FILED
AUG 23 1999
OFFICE OF THE CLERK

No. 98-1480

In The

Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

vs.

RONALD M. PRUPIS, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR RESPONDENT FREDERICK MEZEY

FREDERICK MEZEY, ESQ.
MEZEY & MEZEY, P.C.
4400 Route 9 South
Suite 1000
Freehold, N.J. 07728
(732) 303-7889

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Is the tort of wrongful discharge a sufficient overt act to convert standing on a plaintiff alleging violation of 18 U.S.C. § 1962(d)?

2. Was not the Court of Appeals correct in holding that the plaintiff did not prove a pattern of racketeering activity nor that the plaintiff's alleged injury under 18 U.S.C. § 1964(c) was proximately caused thereby?

3. Is not the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961-1968 (1994) constitutionally invalid due to vagueness?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
ARGUMENT	2
POINT I: THE TORT OF WRONGFUL DISCHARGE OF AN EMPLOYEE IS NOT A SUFFICIENT OVERT ACT TO CONFER STANDING ON THE PLAINTIFF'S ALLEGATIONS OF A VIOLATION OF § 1962(d)	2
POINT II: THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE PLAINTIFF DID NOT PROVE A PATTERN OF RACKETEERING ACTIVITY NOR THAT THE PLAINTIFF SUFFERED DIRECT INJURY UNDER 18 U.S.C. § 1964(c)	5
POINT III: RICO IS CONSTITUTIONALLY INVALID DUE TO VAGUENESS	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Bowman v. Western Auto Supply Co., 985 F.2d 383 (8th Cir.), *cert. denied*, 508 U.S. 957, 113 S.Ct. 2459 (1993)	3
F.C.C. v. American Broadcasting Co., 347 U.S. 284 (1954)	8
Giaccio v. Pennsylvania, 382 U.S. 399 (1966)	8
Grayned v. City of Rockford, 408 U.S. 104 (1972)	8
H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989)	8, 9
Hecht v. Commerce Clearing House, Inc., 897 F.2d 21 (2nd Cir. 1990)	3
Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992)	1, 3, 5, 7
Miranda v. Ponce Federal Bank, 948 F.2d 41 (1st Cir. 1991)	3
O'Malley v. O'Neil, 887 F.2d 1157 (11th Cir. 1989)	3
Reddy v. Litton Industries, Inc., 912 F.2d 291 (9th Cir. 1990), *cert. den.*, 112 S.Ct. 332 (1991)	3
Schiffels v. Kemper Financial Services, Inc., 767 F.Supp. 909 (N.D. Ill. 1991), *rev'd*, 978 F.2d 344 (7th Cir. 1992)	3
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)	9
Warth v. Selvin, 422 U.S. 490 (1975)	2

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES:

18 U.S.C. § 1961(1) (1994) 1

18 U.S.C. § 1962(a)-(c) 7

18 U.S.C. § 1962(d) 2, 7

18 U.S.C. § 1964(c) 5

Fla. Stat. Ann. 112.3187 (West 1997) 2

MISC. SOURCES:

Wall St. J. May 19, 1989, Section 1, page 14 4

SUMMARY OF ARGUMENT

Beck was terminated pursuant to recommendations of an independent consultant under the terms of a contract which contemplated dismissal. At most, Beck may have a tort action under Florida statutes or common law. Beck has shown no overt act committed in furtherance of an alleged conspiracy to violate RICO and Beck was, therefore, not injured.

The Eleventh, First, Second, Eighth and Ninth Circuits are correct in holding that the overt act by which a plaintiff claims injury must be an "act of racketeering" and that wrongful discharge of an employee is not such an act, not being so designated under 18 U.S.C. § 1961(1). It is, therefore, not within the "zone of interest" to be regulated by the statute.

Beck was thus unable to prove that a predicate act was the proximate cause of his alleged injuries under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

Persons of ordinary intelligence could not perceive under the language of RICO that termination of an employee under a written contract, even if wrongful, could constitute a pattern of racketeering activity based on alleged mail and wire fraud. The statute is, therefore, too vague to be enforced and constitutionally invalid.

The Court of Appeals, in this case, was correct and should be affirmed.

ARGUMENT

POINT I

THE TORT OF WRONGFUL DISCHARGE OF AN EMPLOYEE IS NOT A SUFFICIENT OVERT ACT TO CONFER STANDING ON THE PLAINTIFF'S ALLEGATIONS OF A VIOLATION OF § 1962(d)

The plaintiff in this case claims that he was a "whistle blower" who was wrongfully discharged. As pointed out by the Court of Appeals (Petition for Writ of Certiorari App. 10) the plaintiff's employment was governed by a written contract which contemplated its termination either for cause or not for cause.

The plaintiff and the subject corporation were both domiciled in Florida, whose State legislature enacted laws to provide wrongfully discharged "whistle blower" employees with recourse. (*Fla. Stat. Ann.* 112.3187 prohibits adverse action against employees who disclose an employer's malfeasance.) This statute, therefore, appears to establish a right of action for wrongful discharge and to protect employees from retaliation by an angered employer.

It has been held that in order to have standing to sue the plaintiff must show: (1) that the alleged wrongful conduct has caused injury, and (2) that the interest sought to be protected is within the "zone of interest" to be regulated by the statutory provision in question. *Warth v. Selvin,* 422 U.S. 490, 498-501 (1975).

Wrongful discharge of an employee is not among the enumerated acts that constitute racketeering activity under RICO 18 U.S.C. § 1961(1) (1994).

The District Court in the case of *Schiffels v. Kemper Financial Services, Inc.*, 767 F.Supp. 909 (N.D. Ill. 1991), *rev'd*, 978 F.2d 344 (7th Cir. 1992) so held and dismissed the plaintiff's complaint.

Although reversed by the Court of Appeals of the 7th Circuit, the District Court's approach was in accord with decisions in the First Circuit, *Miranda v. Ponce Federal Bank*, 948 F.2d 41 (1st Cir. 1991) the Second Circuit, *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2nd Cir. 1990), the Eighth Circuit, *Bowman v. Western Auto Supply Co.*, 985 F.2d 383 (8th Cir.), *cert. den.*, 508 U.S. 957, 113 S.Ct. 2459 (1993), the Ninth Circuit, *Reddy v. Litton Industries, Inc.*, 912 F.2d 291 (9th Cir. 1990), *cert. den.*, 112 S.Ct. 332 (1991); and the Eleventh Circuit, *O'Malley v. O'Neil*, 887 F.2d 1157 (11th Cir. 1989).

This case squarely frames the issue for a decision by this Court.

The above cases were cited by the Court of Appeals in the present case (Petition for Writ of Certiorari. 15 fn. 16) as constituting the majority of circuits considering this issue who have concluded that discharge of an employee for whistle blowing does not satisfy RICO's proximate cause requirement set down by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

The Court of Appeals in this case correctly pointed out that the express target of RICO was racketeering activity and that "only those injuries that are proximately caused by racketeering activity should be actionable under the statute" . . . citing *Hecht, supra.* ("Congress did not deploy RICO as an instrument against all unlawful

acts. It targeted only predicate acts catalogued under Section 1951(1)") . . . "If there is no racketeering activity . . . there can be no violation of the provisions of this title." (Petition for Writ of Certiorari App. 15-16.)

With the express target of the enactment of RICO in mind – racketeering activity – the Court of Appeals correctly held that the requirement of this Court that plaintiff's injuries must have been proximately caused by acts of racketeering in the context of RICO's substantive provisions in *Holmes, supra* applied equally to the conspiracy provision.

This reasoning is in accord with that expressed by the Chief Justice. ("The legislative history of the RICO Act strongly suggests that Congress never intended that civil RICO should be used, as it is today, in ordinary commercial disputes far divorced from the influences of organized crime.") (Wall St. J. May 19, 1989, Section 1, page 14).

The simple act of discharging an employee does not constitute racketeering activity as defined in RICO and thus does not constitute "predicate acts" within the "zone of interest" to be regulated under RICO. *Warth, supra.*

In this regard the reasoning of the Court of Appeals is correct and should be affirmed.

POINT II

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE PLAINTIFF DID NOT PROVE A PATTERN OF RACKETEERING ACTIVITY NOR THAT THE PLAINTIFF SUFFERED DIRECT INJURY UNDER 18 U.S.C. § 1964(c)

In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) this court (in an opinion by Justice Souter in which the Chief Justice and Justices Blackmun, Kennedy and Thomas joined, and in which Justices White, Stevens and O'Connor joined except for Part IV, as to which Justices Scalia and O'Connor filed concurring opinions) held that RICO contains a proximate cause requirement mirroring that of the Sherman and Clayton Acts. This requirement forces the plaintiff to demonstrate a direct relation between the injury suffered and the alleged injurious conduct.

The Court of Appeals viewed the proposed evidence in a light most favorable to Beck (App. 8) since the case was reviewed by the Court of Appeals after a motion for summary judgment had been granted by the District Court. In his brief Beck misconstrued this view of the evidence in his favor as a finding of fact. (Petitioner's Brief, p. 2)

The Court of Appeals concluded that "for each alleged RICO violation in this case Beck has failed to produce evidence to support at least one of the essential elements of a RICO claim based on mail and wire fraud. For this reason we affirm the District Court's grant of summary judgment" (App. 9).

Each one of Beck's claims, (1) that the defendant's failed to inform Beck of his proposed termination, (2) defendant's failure to inform him of alleged illegal activities, and (3) defendant's alleged creation of false financial statements, all lacked essential elements of intent to injure Beck such as would constitute proximate causation between the alleged injury and Beck's losses. The Court noted:

> " 'But for' causation is insufficient to sustain a claim of fraud. Instead proximate cause is required meaning that this omission must have been a 'substantial factor' in his decision making". (App. 11)

The Court concluded:

> "Beck has presented no evidence (other than the 'but for' testimony)". (App. 11)

Once again, in regard to Beck's allegations that RICO was violated because allegedly fraudulent reasons were created for termination of his employment on the basis of a consulting group's false allegations regarding Beck's job performance, the Court of Appeals correctly noted Beck was not injured through reliance on the report because the report was rendered to the directors of SIG and, therefore, any alleged misrepresentations in the report, could not be the proximate cause of Beck's injury. (App. 13).

Reduced to its basic elements, the Court of Appeals correctly perceived that Beck's claim was simply that the corporation ought to have repurchased his stock and breached its contract by not doing so. Such an allegation constitutes only a common law breach of contract not a

federal statutory offense based on the commission of mail and wire fraud and, therefore, "Beck's firing is not an act of racketeering under RICO."

As to Beck's conspiracy claim under 18 U.S.C. § 1962(d) the Court of Appeals found the proximate cause requirements in *Holmes, supra,* although in the context of RICO's substantive provisions, to be equally applicable to RICO's conspiracy provisions. (App. 15). The Court reasoned that:

> "The conspiracy provision allows persons who are responsible for an injury, but did not actually participate in the jury-causing activity, to be held liable." (App. 16)

and reasoned that to require proof of a direct injury by racketeering activity for §§ 1962(a)-(c) but not for § 1962(d) would be logically inconsistent and would allow plaintiffs to circumvent the requirements of §§ 1962(a)-(c) by simply alleging a conspiracy under § 1962(d) (App. 17).

The Court of Appeals, therefore, concluded that since Beck had presented no evidence that his termination was a result of racketeering activity directed towards him, the District Court's grant of summary judgment on Beck's RICO conspiracy claim was correct and was, therefore, affirmed. (App. 18).

This Court should also affirm.

POINT III

RICO IS CONSTITUTIONALLY INVALID DUE TO VAGUENESS

The United States Constitution Amendment V holds that no person shall ". . . be deprived of life, liberty, or property, without due process of law."

In order to meet the due process requirements of the Constitution it has been held that a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and that it must contain standards of enforcement clear enough to guide courts and juries in determining what the offense is so that application of the law would not be arbitrary and discriminatory. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

These requirements have been held by this court to be equally applicable to civil as well as criminal laws. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284 (1954).

In *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) this Court held that the civil application of penal statutes, such as RICO, must satisfy the certainty requirements of criminal laws. In *H.J., Inc., supra*, Justice Scalia expressed the view in his concurring opinion (in which the Chief Justice, Justice O'Connor and Justice Kennedy joined) that court decisions have provided little guidance as to the meaning of the "pattern" requirement in RICO, and have made it more rather than less difficult for potential defendants to know whether their conduct may be covered under RICO. Justice Scalia noted the "Kaleidoscope of circuit positions" following *Sedima,*

S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) (holding that two isolated acts of racketeering activity, sporadic activity, or two acts of racketeering activity without more, would not be enough to constitute a pattern noting that the term "pattern" requires a showing of continuity plus relationship.) *Id.* at 496. Justice Scalia further noted that "There is no reason to believe that the Courts of Appeals will be any more unified in the future than they have in the past regarding the content of this law." *H.J., Inc., supra* at 255.

As applied to this case, which involves a dispute concerning whether or not a contract was breached, the situation is far removed from the "zone of interest" which Congress must have envisioned as being within RICO's scope of coverage. This is not a case where, even assuming that the allegations in the complaint could be proved, would show that the "pattern" requirement had been clearly satisfied regardless of how narrow the interpretation of the term "pattern" may be, the alleged "predicate act," mail and wire fraud, being isolated and sporadic, not regularly recurring.

Accordingly, this Court could conclude that persons of ordinary intelligence in the defendant's situation would not have had adequate notice that the alleged "mail and wire fraud" constituted a pattern of racketeering activity under RICO.

It would be appropriate for this court to find that "the pattern requirement" in RICO is unconstitutionally vague as applied to these defendants. Such claims being

unconstitutionally vague, the RICO claims should be dismissed.

CONCLUSION

For the reasons set forth herein, the Court of Appeals was correct and should be affirmed and the RICO statute should be declared unconstitutional for vagueness.

Respectfully submitted,

FREDERICK C. MEZEY, ESQ.
MEZEY & MEZEY, P.C.
4400 Route 9 So., Suite 1000
Freehold, NJ 07728
(732) 303-7889